FILED
OCT 1 1982
CLERK

No. 82-370

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MARILYN CARPENTER,
Appellant,

vs.

JAY S. HAMMOND, GOVERNOR OF ALASKA,
Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION OF JAY S. HAMMOND, GOVERNOR OF ALASKA TO DISMISS OR AFFIRM

WILSON L. CONDON
Attorney General

THOMAS M. JAHNKE
COUNSEL OF RECORD
Assistant Attorney General

State of Alaska
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600
Counsel for Appellee

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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MOTION OF JAY S. HAMMOND, GOVERNOR OF ALASKA TO DISMISS OR AFFIRM

Appellee Jay S. Hammond, Governor of Alaska, moves this Honorable Court, pursuant to Rule 16.1(a), Rule 16.1(b) and Rule 16.1(d) of the Rules of the Supreme Court of the United States, to dismiss the above-captioned appeal of appellant Marilyn Carpenter because the appeal is not taken from a final judgment of the Supreme Court of the State of Alaska, because the third question presented was never "drawn in question" in the state courts, because appellant has conceded that she has failed to allege and prove her standing to pursue the appeal, and because the appeal does not present a substantial federal question; or, alternatively, to affirm the judgment of the Supreme Court

of the State of Alaska. Should the jurisdictional statement of the appellant be treated as a petition for certiorari, the Governor respectfully requests that the petition be denied for the reasons set out in this motion.

I

INTRODUCTION

This appeal concerns Alaska Governor Jay Hammond's 1981 reapportionment of the Alaska Legislature. Appellant's claim is that it was improper to base the reapportionment on a population count which excluded those military personnel and military dependents who neither considered Alaska their home nor registered to vote in Alaska.

The treatment of servicemembers and their dependents in the reapportionment process is best understood when viewed together with the treatment of other groups in Alaska thought to contain large numbers of nonresidents. The Governor's nonpartisan Reapportionment Board, appointed pursuant to Alaska Constitution, article VI, section 8, knew in advance that the United States Bureau of the Census would count many persons who did not consider themselves to be residents or domiciliaries of Alaska. For this reason, the board decided to secure the services of an expert to advise it on the treatment of groups in Alaska thought to contain large numbers of nonresidents, including military personnel and their dependents, oil production base camp workers, seasonal lumber camp workers, seasonal workers at fish processing facilities, students, felons, and aliens. Professor John A. Kruse of the Institute of Social and Economic Research of the University of Alaska, an expert in Alaska demography and survey research, was retained for this purpose.

Professor Kruse determined that students, aliens, felons and oil production base camp workers would not skew any apportionment scheme.[1] The board and the Governor, therefore, chose not to exclude any of their numbers from the reapportionment population base. No issue was made of this decision at trial or on appeal to the Alaska Supreme Court. However, fish processing workers, lumber workers, and military personnel and their dependents presented closer questions.

Professor Kruse expected that the census bureau would significantly undercount fish processing workers in Bristol Bay and the Aleutian Islands. Such counts of workers are usually inaccurate when the counters are disorganized, when the workers and their supervisors are hostile, when the workers are spread among many locations, when the locations are remote and mobile (as were many fish processing ships), and when the counters are so poorly paid that they have no incentive to overcome these difficulties. All these problems plagued the census in southwestern Alaska. Because of the likely and significant undercount, any attempt to exclude nonresident employees would likely have resulted in a double elimination, taking out of the population base persons who were never included in the first place. Finally, workers who identified to the census bureau a different place as a home address were allocated to that other place by the census bureau. *See* Jurisdictional Statement, Appendix B-11 through B-16.

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[1]The reasons varied: most college students were found to be Alaska residents; aliens were relatively few in number, spread across many districts and very difficult to locate; felons were few in number; and oil base camp workers were counted by the census bureau at their true homes rather than their work camps.

A special census report on fish processor housing released four months after the Governor promulgated his plan vindicated Professor Kruse's judgment concerning the likely undercount of fish processing workers. Whereas the fish processing employers reported that their work force numbered approximately 2,500, the census bureau counted only 760 persons. The remaining 1,700 were either missed by the census bureau or reallocated to their true homes on the basis of their responses to the home address question. There was, as well, no way to determine the residency characteristics of the 760. Indeed, it was likely that most of the nonresidents who were thought to be present among the 2,500 were missed or reallocated, leaving residents highly concentrated in the 760. There was, therefore, no reliable or legal basis for excluding any fish processing workers. Jurisdictional Statement, Appendix B-16.

Lumber workers presented the census bureau and Professor Kruse with essentially the same problems as fish processing workers. There was an undercount of an already very small population (630 potential nonresidents *state wide*), and those nonresidents that were found by the census bureau were reallocated to their true homes. Jurisdictional Statement, Appendix B-16 through B-17.

The board's and the Governor's treatment of military personnel and their dependents was summarized in the board's report (footnotes omitted):

> The only segment of the population thought to contain large and readily-identifiable concentrations of non-residents is military personnel and their dependents. Historically, this group has been concentrated

in great numbers in a handful of communities. Their residency factor has been thought to be very low.[2]

Dr. Kruse determined that there are seven military installations with populations large enough to affect the reapportionment process. These installations are Elmendorf Air Force Base, Eielson Air Force Base, Fort Wainwright, Fort Richardson, Fort Greely, Adak Naval Base, and the Kodiak Coast Guard Station.

Because military records are not updated consistently, they were deemed unreliable. A full census of military personnel and their dependents was rejected both because of cost and because more reliable results can actually be obtained from a survey of a scientific sample. Thus, it was decided to proceed with a survey of military personnel and dependents, both on- and off-base.[3]

The survey sought to answer two questions: First, did the respondent consider Alaska to be his or her home; second, was the respondent registered to vote in Alaska. If the answer to *either* of these inquiries was "yes," the respondent was deemed to be a resident; put another way, a person was not deemed to be a nonresident unless he or she neither voted nor considered Alaska home.

Separate nonresidency factors were obtained for on-base servicemembers, on-base dependents, off-base servicemembers and off-base dependents. The off-base results were achieved by use of address lists provided by the military branches which allowed Dr. Kruse to de-

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[2] In 1972, the board found only eleven percent of active duty personnel to be residents. Groh v. Egan, 526 P.2d 863, 874 (Alaska 1974). In 1980, military records revealed that three to six percent of servicemembers in Alaska claimed Alaska as their residence.

[3] The survey form, with Governor Hammond's introductory letter, is reprinted *infra* as Appendix I.

termine with precision, how many servicemembers and dependents live in each off-base enumeration district[*] near a given installation.

The results ranged from a low of seven percent residents among active duty personnel at Adak Naval Station to a high of sixty-four percent residents among Eielson Air Force Base dependents living off-base. The appropriate factor was applied to each military and dependent group at the enumeration district level, and the population of each enumeration district was reduced accordingly.

II

ARGUMENT

A. There has been No Final Judgment by the Alaska Supreme Court; Jurisdiction is Therefore Lacking

The Alaska Supreme Court has never entered a judgment on any issue in this case. That part of the order which is said to be the jurisdictional basis for this appeal is nine words long: "Otherwise, the judgment of the superior court is affirmed." The court then declared that an opinion will follow. Jurisdictional Statement, Appendix A. There is subsumed in those nine words eleven points on appeal and fifty pages of arguments on the military survey issues alone. Six of the points on appeal are factual issues which, as primarily state law questions, will be finally determined by the Alaska Supreme Court when it issues its opinion.

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[*] An enumeration district is one of the smallest geographic areas forming the building blocks of the census. In the 1980 census, there were approximately 1,100 enumeration districts in Alaska.

The factual issues yet to be decided by the state court are critical to the resolution of this appeal. The trial court's factual findings with respect to servicemembers and other groups in Alaska, if affirmed by the Alaska Supreme Court, seriously undermine the factual basis for appellant's legal arguments.[5] The answer to the legal issues would be determined, in large part, by facts in the record, and the Alaska Supreme Court's confirmation of the factual findings would likely be deemed conclusive in this Court. *Eau Claire National Bank v. Jackman,* 204 U.S. 522, 537 (1907).

There is totally absent from the order appealed from any resolution of key factual disputes and any statement of a *ratio decidendi.* For these reasons, the order should not be deemed a final judgment.

In short, this appeal is premature.

B. Appellant Concedes that She has Failed to Allege Standing

The appellant is neither a servicemember nor a dependent. So far as the record shows, she has never been in the military and has no connection with the military. Appellant has not alleged that a single servicemember or dependent

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[5]The challenged findings that civilians vote at a rate 5.6 times higher than servicemembers, that there is an established pattern of military non-participation in the political life of Alaskan communities, and that fish processing and lumber workers could not feasibly be surveyed and excluded from the reapportionment population, are central to the Governor's thesis that he acted reasonably and constitutionally in surveying and excluding a portion of the servicemember population and not other groups.

lives in her district; indeed, she has omitted entirely to plead or prove her election district.[6]

Appellant called no servicemembers or dependents to testify; to our knowledge none has complained of the Governor's survey in a judicial or any other forum. The only expert witnesses on the military in Alaska were the Governor's own, one of whom was called by the appellant in her case in chief. Appellant called only one other witness on these issues.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), this Court described the standing analysis:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). *See also*

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[6]The Governor moved to dismiss both the complaint and the appeal for lack of standing, but appellant was held to have "voter standing" under Alaska Constitution, article VI, section 11. In her jurisdictional statement, appellant claims to have standing by reason of residence in a certain election district containing a certain number of servicemembers. However, those items are not in the record: they only appeared in an "amended complaint" offered for the first time in this Court, and which the clerk refused to file.

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Id. at 72.

This appeal presents no concrete controversy in a fully-developed factual context: The pleadings and record do not reveal where appellant resides. From the pleadings, we do not know whether even one servicemember resides in her district. Having failed to plead residence in a specific district with military residents, no evidence was adduced to show that military residents, though excluded from the reapportionment population base, actually vote and thereby dilute the weight of appellant's vote. Not a single member of the allegedly injured class, servicemembers, claims any injury at all.

A number of federal and state courts have ruled on the the propriety of legal challenges to legislative apportionment plans by persons not in the injured class or the underrepresented district. They have held uniformly that such persons lack standing to sue. *Fairley v. Patterson*, 493 F.2d 598, 603-604 (5th Cir. 1974; *Shapiro v. State of Maryland*, 336 F. Supp. 1205, 1208-1209 (D. Md. 1972); *Vigneault v. Secretary of the Commonwealth*, 237 N.E.2d 286, 287 (Mass. 1968); *McGlue v. Essex County Commissioners*, 113 N.E. 742, 743-744 (Mass. 1916).

C. The Third Question Presented by Appellant was not Raised or Decided in the State Courts; It Cannot be Raised for the First Time in this Court

The third question presented in appellant's jurisdictional statement was not raised in the Alaska Supreme Court[7] or in the trial court.[8] As such, the issue was not "drawn in question," *see* 28 U.S.C. § 1257(2), and cannot be considered by this Court. *E.g., Cardinale v. Louisiana,* 394 U.S. 437, 438-439 (1969).

D. The Questions Presented are Not Substantial; The Military Survey was a Constitutional Device to Measure Nonresidency and Minimize Dilution of Voting Strength Caused by Inclusion of Nonresidents

The decision of the board and the Governor to exclude nonresidents from the reapportionment population base was premised on the seminal pronouncement of this Court in *Reynolds v. Sims,* 377 U.S. 533 (1964):

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as

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[7]Appendix II, *infra,* a copy of appellant's description of the issues presented to the Alaska Supreme Court, makes no mention of the issue. Such an omission from the "assignments of error" in state court has been deemed significant by this Court in deciding to refuse review. Beck v. Washington, 369 U.S. 541, 553 (1962). It is the rule in Alaska that matters set out in the points on appeal but not briefed are waived, and matters briefed but not set out in the points on appeal are also waived. Wetzler v. Wetzler, 570 P.2d 741, 742, note 2 (Alaska 1977). *See* State v. Wassilie, 606 P.2d 1279, 1281, n. 7 (Alaska 1980). Rule 210(e), Alaska Rules of Appellate Procedure, provides, in part, that the supreme court will consider only the points included in the statement of points on appeal.

[8]*See* Jurisdictional Statement, Appendix B-11 through B-25.

> effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 555.

It is self-evident that a resident, in a district with many nonresidents who take no interest in state and local political affairs, who do not vote, and who retain domiciles elsewhere, has considerably more influence on the legislative process than a resident in a "solid" district who must compete with many more actual voters and constituents to elect and influence a legislator. The latter resident's vote and influence is effectively debased and diluted. To alleviate this effect, it was decided to subtract from the census counts those numbers of identifiable nonresidents whose inclusion would otherwise distort the political influence of residents.

Neither the appellant nor anyone else objected to the board's and the Governor's decision to leave college students, aliens, felons and oil production base camp workers in the reapportionment population base. The reasons are briefly set out in n. 1, *supra*.

The only nonresident groups that could have impacted apportionment by diluting or inflating others' political influence were those groups that were both large and unevenly distributed across the state.[9] The only such groups were seasonal fish processing workers, seasonal lumber camp workers, and military personnel and their dependents.

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[9]Even a very numerous class will not skew apportionment if its members are widely dispersed across the election districts. For example, in Alaska, there may be thousands of transient construction workers. But because they are evenly distributed, their inclusion will not distort legislative representation: the election district boundaries will remain the same and the districts will remain equipopulous whether they are included or excluded.

No exclusion of fish processing and lumber workers was possible because any study of those workers would have been unreliable,[10] and because an exclusion would have worked a double elimination by removing from the population base persons never counted by the census bureau. Jurisdictional Statement, Appendix B-15.

Only military personnel and their dependents were counted in the census in Alaska, were identifiable, *and* were distributed in such a way and in such numbers as to impact apportionment. For these reasons, the board and the Governor commissioned a voluntary survey of several thousands of randomly-selected servicemembers to determine how many were Alaska residents and how many were registered to vote in Alaska. Residence was presumed; a servicemember was deemed a nonresident only if he or she neither registered to vote in Alaska nor considered Alaska home.

This Court has confirmed the right of states to treat nonresidents differently for voting and representation purposes. The clearest statement is found in *Burns v. Richardson*, 384 U.S. 73 (1966). In that case Hawaii had formulated a reapportionment plan based exclusively on the registered voter population. Many military personnel were thereby excluded from the population of certain districts because many were not registered voters. This Court found that using the registered voter population as a basis was, under the circumstances of the case, acceptable because there was no showing that it excluded persons in the com-

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[10]The reasons supporting this conclusion are set out in detail in the Jurisdictional Statement, Appendix B-12 through B-17.

plainant's class who would not be excluded under some other acceptable population enumeration.

On the central question of the propriety of any exclusion of portions of the population, this Court observed:

> We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of a crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.[21] The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.

Id. at 91-92. Footnote 21 to the text reads, in pertinent part, as follows:

> Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. *See also* Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775. Where the exclusion is of those not meeting a State's residence requirements, however, different principles apply. The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification.

This Court then referred with apparent approval to the use of state "citizen" population as a basis for reapportionment. *Id.* at 93-95.

In *Carrington v. Rash*, 380 U.S. 89 (1965), this Court faced the different legal question of the right of military personnel to vote (as distinguished from their right to be counted for reapportionment purposes). This Court struck down a law which forbade active duty military personnel to vote in Texas elections unless they were Texas residents before enlistment, but in so doing, an important distinction was underscored:

> We stress—and this a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents *with the intention of making Texas their home indefinitely*, they, as all other qualified residents, have a right to an equal opportunity for political representation.

Id. at 93-94 (emphasis added).

The Alaska Supreme Court has addressed the question of the military in reapportionment in two of its opinions. In *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972), the court identified the problem:

> We recognize that the substantial military population present in the state because of military orders and without intention to make Alaska their home can easily give an unbalanced representation to areas abutting their bases.

Id. at 870. The phenomenon is well-known in history as "rotten boroughs." *See generally Baker v. Carr*, 369 U.S. 186, 302-307 (1962) (Frankfurter, J., dissenting). The court went on to declare that "plans based on accurate data of

state citizenship or state residency could meet the standards of the federal equal protection clause." *Id.* at 870 (emphasis added).

In *Groh v. Egan*, 526 P.2d 863 (Alaska 1974), the Alaska court reaffirmed its observations in *Egan v. Hammond* about treatment of military. In so doing, two criteria were crystallized:

> It is thus not offensive to notions of equal protection to exclude from the population base even military personnel who have lived in Alaska for substantial periods of time, *so long as those people have exercised their option to remain residents and domiciliaries of other states.*

Groh v. Egan at 873 (emphasis added). On the same page, at n. 36, it was found

> There is every reason to believe that military personnel who desire to be Alaska residents and domiciliaries will register to vote because *voter registration is a prime index of intention to become a resident or domiciliary.* For like reason, we think that *those who do not want to become Alaskans demonstrate that intention by refusing to register to vote.*

Id. (emphasis added).[11]

As Justice Boocheever stated on behalf of the court:

> We hold that it was reasonable for the Board to exclude some proportion of military personnel not merely because of their transience, but because a significant number of Alaska-based military personnel

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[11]Justice Boocheever's statement is in accord with this Court's expressions in *Burns* concerning a registered voter population base. For in *Groh*, voter registration was *a* factor, not the only factor; the measure was not registered voters but a ratio of population and registered voters in both civilian and military districts.

> exercise an option to be non-Alaskans, despite their physical presence here.

Id. at 872.[12]

Appellant's attack on the military survey is premised on a misunderstanding of the record. She asserts in her jurisdictional statement that servicemembers were excluded if they did not "intend to remain a resident indefinitely. Anyone who intends to leave the state at some point in the future and not return is ineligible for state citizenship." Jurisdictional Statement at 15. This is simply wrong. The actual questions on the military survey imposed no durational requirement:

1. Do you consider your home to be in Alaska or some other state?

2. Do you plan to make your home in Alaska or some other state when you leave the military?

See Appendix I. Furthermore, servicemembers who were registered to vote were deemed residents regardless of their responses to the questions.

The terms of the second question ("when you leave the military") address one key, distinguishing fact for military personnel: they are in Alaska not by choice but as a result

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[12]It is the Governor's view that such an exclusion may be *required* by the United States Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1973. Insofar as the political strength of persons in districts without nonresident military would be diluted as compared with the political strength of persons in districts with nonresident military, equal protection of the laws may be denied. And if the disparity were to exist as between military districts and predominantly Native districts, § 1973 would be implicated.

of legal compulsion.[13] Thus, it is extremely difficult for them to acquire a domicile of choice unless they are relieved of the legal threat by retirement or discharge. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17.

Appellant places principal reliance on three cases. The distinguishing features of two, and the unsoundness of the third, are patent. Both *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972), and *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972), involved plaintiffs who had come voluntarily to their respective college communities and who had demonstrated their interest in the political life of their communities by attempting to register to vote. What the courts found objectionable was an essentially irrebuttable presumption that one was not qualified to vote unless one had the intention to remain in the state permanently or indefinitely. The Governor agrees that the standard is objectionable.

We quote from *Ramey* at length:

> Thus, we think that the only constitutionally permissible test is one which focuses on the individual's present intention and does not require him to *pledge allegiance for an indefinite future.* The objective is to determine the place which is the center of the individual's life now, the locus of his primary concern. The determination must be based on *all* [emphasis in original] relevant factors; it is not enough that a student, or any other former non-domiciliary, would find that the place of his presence is more convenient for voting

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[13] At the same time, it should be noted that not one servicemember or dependent was excluded on the basis of their presence under legal compulsion; that was only a factor identifying them as potential nonresidents. They were excluded only if they neither voted nor considered Alaska home.

> or would enable him to take a more active part in political life. *The state may insist on other indicia, including the important one of abandonment of a former home.*
>
> We think therefore that, in determining bona fide residence for a person physically present, the state cannot constitutionally go further than the test set out in the Restatement (Second) of the Conflict of Laws § 18 (1971), namely, that he "must intend to make that place his home for the time at least." Important points for consideration are that "The search in each instance is for the state to which the person is most closely related at the time;" and that a person can have the proper attitude to acquire a domicile even if he intends to move at a fixed time in the future; but that on the other hand, *"The required attitude of mind involves to a certain extent the idea of fixity;" and that a person does not have a domicile at a place if he has the intent to return to another that had been his home.*

Id. at 788-789 (emphasis added except as noted; footnote omitted).

In context, and with close attention to the text, comments and illustrations of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), even the court's references to "present intention," and intent to make the state "his home for the time at least," *id.* at 788, are readily seen to be consistent with the questions asked in the military survey in this case.

Section 17 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) provides that "A person does not acquire a domicil of choice by his presence in a place under physical or legal compulsion." Comments to and illustrations of the section are instructive:

> *Soldiers and sailors.* A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him, will probably not acquire a domicil there though he lives in the assigned quarters with his family. He must obey orders and cannot choose to go elsewhere. On the other hand, if he is allowed to live with his family where he pleases, provided it is near enough to his post to enable him to perform his duties, he retains some power of choice over the place of his abode and may acquire a domicil. To do so, however, *he must regard the place where he lives as his home.* Such an attitude on his part may be difficult to establish in view of the nomadic character of military life and particularly *if he intends, upon termination of his service, to move to some other place.*

Id., Comment d (emphasis added).

> A's domicil is in state X. As an officer in the Army, A is required to live on an Army post in state Y. His wife resides there with him. A is still domiciled in X.

Id., Illustration 1.

> A's domicil is in State X. A is appointed a member of the Cabinet. A purchases a house in Washington, D.C., and lives there with his family. A person in A's position will usually not intend to make his home in Washington, D.C. In the absence of facts showing *an intention to remain in the District of Columbia after his tour of duty,* A will probably be found to have retained his domicil in X.

Id., Illustration 7 (emphasis added).

Section 18 of the RESTATEMENT (SECOND) provides that "To acquire a domicil of choice in a place, a person must intend to make that place his home for the time at least." Comment (b) is instructive:

> An intention to make a place one's home for a limited time may not effect a change of domicil when there is a *present intention to return to the previous home.* The required attitude of mind involves to a certain extent the idea of fixity. It is essential that the person intends to remain in the place for *a* time at least. If he intends to remain there permanently, it is easier to find the required attitude of mind than if he intends to move away at some time in the future. If he does not intend to move at a definite time, it is easier to find that he has this attitude of mind than if he intends to move at a definite time.[14] It is possible, however, for a person to have the proper attitude of mind even though he does intend to move at a definite time; although the more distant that time is, the easier it is to find the requirement satisfied.
>
> Other factors to be considered include the person's feelings toward the place. It is not essential that the place be the one where he would prefer to live or to which he is sentimentally most attached. But if the place does occupy such a position in his affections it is easier to find the requirements of this Section satisfied than if it does not. Similarly, it is easier to find the existence of the requisite intention if the person has abandoned his former place of domicil than if he retains important ties with it (see Special Note following § 20). The search in each instance is for the state to which the person is most closely related at the time.

Id. (emphasis added).

Section 19 of the RESTATEMENT (SECOND) declares that "A domicil once established continues until it is superseded by a new domicil." Two illustrations bear on the case at bar:

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[14]In Alaska, servicemembers serve fixed tours of duty of three years duration.

1. A, having a domicil in state X, ceases to live there. A does not acquire another home. A's domicil is in X.

2. A, having a domicil in state X, goes to live in state Y. A has not yet decided to make his home in Y. A's domicil is in X.

Thus, a declaration that the constitutional test is one of "*present* intention" is easily misunderstood when taken out of its context in the RESTATEMENT (SECOND). The term itself is something of a contradiction in terms: "intention" is, by definition, a reference to the future. "Present intention," in the *Ramey* court's use, must be read to mean "the plan for the future which one holds to today."

Neither can it be forgotten that the *Ramey* court embraced one requirement that was central to the military survey in the case at bar: the requirement that a person abandon a former home and any intention to return to that place as a home. *Id.* at 788.

What distinguishes the case at bar from *Newburger* and *Ramey* are five facts. First, the class of persons here came to Alaska under legal compulsion. Jurisdictional Statement, Appendix B-19.

Second, whereas plaintiffs in *Newburger* and *Ramey* declared in unequivocal terms their interest in the political life of their college communities, the class here has just as unequivocally stated the opposite by declaring *both* that Alaska is not their home and that they do not wish to vote here.[15]

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[15]Alaska Director of Elections Patty Ann Polley testified that civilians and their dependents vote at a rate 5.6 times higher than military personnel and their dependents (45% vs. 8%). But political inactivity is not the only factor which sets military apart from

Third, had there been a presumption of nonresidence, members of the class here could individually have rebutted it by a simple, anonymous declaration of either an Alaskan home or Alaska voter registration. It is noteworthy that, in the introductory letter which was attached to each survey and is set out in Appendix I, the Governor assured respondents that their responses would be confidential, would not affect their taxes, their hunting or fishing privileges, their right to vote or any other right under Alaska law, and that they could change their home no matter how they responded to the questionnaire.

Fourth, unlike the *Newburger* and *Ramey* situations, respondents to the military survey were not required to pledge to remain in Alaska for *any* period of time. They could formulate a new intent the next day.

Fifth, whereas the objectionable criterion in *Newburger* and *Ramey* (intent to remain permanently) depressed voter registration, the criterion to which appellant objects (question 2, intent to make one's home in Alaska upon discharge) actually received the *highest* "Alaska" response rate. Question 1 yielded a residency rate of twenty-seven percent; question 2 yielded a residency rate of thirty-one percent.

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civilians. Brigadier General William J. Sharrow offered an extensive litany of facilities and services available on-base and on-post which were the bases for Judge Moore's factual finding that the Alaska installations are self-contained and insular. Professor Kruse testified that 72 percent of school-age dependents are in grades 1-6, and General Sharrow noted that they attend schools on-base or on-post. Because military families contain a disproportionate number of preschool age children, the 72 percent figure is a substantial underestimate of the proportion of all military children who need not leave the base or post to attend school.

The third case upon which appellant relies is *Marks v. Township Committee of New Hanover*, 308 A.2d 24 (N.J. App. 1973). The Governor believes that no more need be said than that, on the point for which appellant cites the case, the *Marks* court could cite only contrary authority. *Id.* at 26, n.3. Since 1973, *Marks* has never been cited for any proposition in any reported decision.

Finally, appellant objects that some persons were included as residents by reason of voter registration while others, not registered, were included or excluded on the basis of a "more restrictive" intent standard of residency. Her argument runs counter to her entire theory of the case, namely, that the survey had the invidious design to, in the words of appellant's complaint, "reduce the representation of the Anchorage and Fairbanks areas." Appellant pleaded no other harm.

If this Court concludes that the intent questions on the survey were constitutional devices to minimize the dilution of the voting strength of persons in districts with few or no military, appellant can hardly complain if military and their dependents who are registered to vote were automatically included. If the rest of the survey is constitutional, the fact that some military were *included* on a "less restrictive" standard has not harmed appellant; if there are military in her district, it has helped her.

There is no factual basis in the record for appellant's claim that, had this two part test been applied to civilians, many of their number would have been excluded as well.[18]

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[18]To the contrary, the record reflects that civilians vote at a much higher rate than military, and they are more likely to be Alaska residents because they came to Alaska voluntarily. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17.

Even if there were a factual basis, it would make no difference since those nonresident civilians would be evenly distributed across the state. *See* n. 9, *supra*.[17]

Viewed overall, appellant's claims are clearly not substantial. She has cited but one case supporting her contentions *(Marks)* and it is contrary to the settled law of domicile and the decisions of this Court.

The absence of conflict in the decisions also militates against review of this case. The leading cases on these issues are this Court's decisions in *Burns* and *Carrington* and the Alaska court's decision in *Groh*, and they squarely support the Governor in this appeal. Only the *Marks* decision by the New Jersey appellate court stands opposed, and its infirmity has already been noted.[18]

Another consideration, especially prominent in the certiorari cases, is the national importance and the recurrent nature of the problem presented. *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967); *Baggett v. Bullit*, 377 U.S. 360, 366 (1964). It cannot be gainsaid that voting and reapportionment are issues of the greatest import. But the

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[17]Appellant's arguments concerning the domicil of spouses and children are unmeritorious. The notion that a servicemember's spouse and children have a different domicil from the servicemember is strained. Unless we are to presume divorce and a termination of parental rights, the domicil of the spouse and children will be the same as that of the servicemember. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 21-22. In any event, the survey with respect to spouses, children and other dependents specifically inquired about those dependents; it was not assumed that they followed the residence of the servicemember, it was asked and proved.

[18]A conflict does not exist between decisions adjudicating different legal interests on different facts. *See* Keller v. Adams-Campbell Co., 264 U.S. 314, 319 (1924). Therefore, *Ramey* and *Newburger* provide no justification for this appeal.

treatment of military in the voter registration and reapportionment contexts is an issue which this Court settled sixteen years ago. It does not require this Court's review, especially when the servicemembers themselves have made no complaint.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), this Court dismissed a writ of certiorari because there were no "special and important reasons" for granting the writ as required by Supreme Court Rule 19 (now Rule 17). Mr. Justice Frankfurter's remarks for the Court are timely:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Id. at 74 (citations omitted). This case, like *Rice*, presents "rather unique circumstances," *id.*, which exclude it from the "special and important" category. The unusual questions attract attention; but only recurring or growing problems, national in scope, demand this Court's review.

Furthermore, appellant's contentions lack even the abstract appeal of the *Rice* issues since they have already been considered in *Burns* and *Carrington* and resolved adversely to appellant:

> In light of our previous decisions, the plaintiff has failed to raise a substantial federal question and the appeal is dismissed for want of jurisdiction.

Patterson v. Stanolind Co., 305 U.S. 376, 379 (1939).

This appeal, too, should be dismissed.

III

CONCLUSION

It is well-established in the decisions of this Court that persons who, though physically present in a state, do not consider it their home need not be admitted to the franchise or included in a reapportionment population base. The persons so excluded in this case not only did not consider Alaska home, they had no wish to vote. It was this situation, and the guidance of this Court, which caused the Alaska Supreme Court to approve the Governor's reapportionment plan. Plenary consideration by this Court can do no more justice.

The Governor respectfully requests that this Court dismiss this appeal because it is premature, because the appellant has no standing to appeal, and because the appeal presents no substantial federal question. In the alternative, the Governor requests that the decision of the Alaska Supreme Court be affirmed summarily.

Respectfully submitted,

WILSON L. CONDON
Attorney General
THOMAS M. JAHNKE
COUNSEL OF RECORD
Assistant Attorney General
Counsel for Appellee

(Appendices follow)

Appendix I

Jay S. Hammond
Governor

[Letterhead]

State of Alaska
Office of the Governor
Juneau

May 23, 1980

Dear Servicemember:

I am required by the Constitution to adjust Alaska's legislative districts after the 1980 census to account for population shifts. For this reason, it is crucial that I know how many servicemembers consider Alaska to be their legal residence or home. To learn this, the following questionnaire is being sent to a randomly selected group of servicemembers.

Even though you are stationed in Alaska, your home may be in another state. If you intend to remain in or return to Alaska to live when your military service ends, then Alaska is your home; but if you intend to return to another state, your home is in that other state. Until you decide to change your home to a new place, it remains in that state in which you previously lived and considered home. You can have only one home at a time. You need not have a house, apartment or dwelling in a place to have your home there.

This survey is voluntary, but your cooperation counts. Your answers will be seen *only* by my staff and will not

affect your taxes, your hunting, trapping or fishing privileges, your right to vote or any other right under Alaska law. Finally, you can change your legal residence or home no matter what you answer on the questionnaire. Thank you for your help in this important undertaking.

Sincerely,

/s/ JAY S. HAMMOND
Jay S. Hammond
Governor

Please fill out the questionnaire, detach the self-addressed stamped post card and drop it in the mail.

INSTRUCTIONS: Please check the appropriate box for questions 1, 2, 3, & 7. Please put the appropriate number in the box for questions 4, 5 & 6.

For follow-up purposes only

1. Do you consider your home to be in Alaska or some other state?

1. Alaska	Some 2. Other State

2. Do you plan to make your home in Alaska or some other state when you leave the military?

1. Alaska	Some 2. Other State

3. Are you registered to vote in the State of Alaska?

1. Yes	2. No

4. How many dependents currently live with you (spouse, children)?

5. How many of these dependents consider their home to be in Alaska *and* intend to make their home in Alaska in the future?

6. How many of these dependents have registered to vote in the State of Alaska?

7. Do you live on the military installation itself?

1. Yes	2. No

Appendix II

Case No. 81-5839

In the Supreme Court for
the State of Alaska

Marilyn Carpenter,
Plaintiff-Appellant

vs.

Jay S. Hammond, Governor of Alaska,
Defendant-Appellee

On Appeal from a Judgment of the
State Superior Court for the
State of Alaska

Brief of Appellant

I. THE ISSUES PRESENTED

1. Whether it was constitutionally permissible to utilize a residency test which included the requirement of an intention to remain indefinitely in the state. (T.B. p.5)[1]

2. Whether the residency test applied only to military personnel and their dependents discriminates against military personnel and their dependents by subjecting them to a higher standard of citizenship than the rest of the population. (T.B. p. 10)

3. Whether the residency test established two different standards within the class of military personnel and their dependents in that some members of the class were held to

[1]T.B. indicates Trial Brief Case No. 81-5839

an indefinite intention test while others were classified as residents on the basis of less restrictive election code standards. (T.B. p. 12)

4. Whether the legal compulsion doctrine is relevant as a factor in the determination of military domicile for reapportionment purposes. (T.R. p. 917; F.J. p. 9)[2]

5. Whether the use of a future intent test while unconstitutional as applied to certain groups for voting purposes, is constitutionally permissible as applied to the military for reapportionment purposes. (T.B. p.8; F.J. p.9)

6. Whether the legal compulsion doctrine is constitutionally permissible as applied to military dependents for domicile purposes in reapportionment. (T.R. p. 917; F.J. p. 9)

7. Whether the inclusion of Cordova in House District 2 is constitutional and reasonable in light of Article VI, § 6 of the Alaska Constitution. (T.B. p. 15; F.J. p. 11)

8. Whether House District 2 is formed of contiguous and compact territory. (T.B. p. 13; F.J. p. 16)

9. Whether socio-economic integration requires social and economic interactions among the population of an election district. (T.B. p. 18; F.J. p. 17)

10. Whether House District 2 contains as nearly as practicable a relatively integrated socio-economic area. (T.B. p. 13; F.J. p. 17)

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[2]T.R. indicates Transcript case no. 81-5839; F. J. indicates Final Judgment case no. 81-5839.